1958

State of Utah v. Carlos Herrera and Kenny Navarez : Brief of Appellants

Utah Supreme Court

L. G. Bingham; Attorney for the Appellants;

IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

#8804

-Vs-

CARLOS HERRERA, and
KENNY NAVAREZ,

Defendants and Respondents.

BRIEF OF APPELLANTS

L. G. BINGHAM
Attorney for the
Appellants

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PRELIMINARY STATEMENT

Defendants appeal from the verdict of the jury finding the defendants guilty of the crime of rape.

The record on appeal is in two volumes one of which consists of the pleadings, minute entries and similar papers. All references to this volume are designated by the letter "R". The other volume which is separately numbered is a transcript of the

testimony and proceedings at the trial. References to this volume are designated by the letter "T".

STATEMENT OF FACTS

The evidence discloses that the prosecutrix, Betty Martinez, was at the time of the alleged crime 15 years of age. She was married to a man in the armed forces of the United States and the mother of a small child. She accompanied one Betty Dominguez to Ogden, Utah, on the 6th day of June, 1957, and later entered an automobile driven by the husband of Betty Dominguez, one Frank Dominguez. At the time the prosecutrix entered the automobile there were present in addition to the prosecutrix, Betty Dominguez, Frank Dominguez, Johnny Dominguez, Kelly Valdez, Orlando Borella, and Joe Garcia.

The party drove around Ogden for some time and then parked in front of an establishment on 25th Street in Ogden, Utah. Orlando Borella left the car at this time and defendants Herrera and Navarez joined the group.

The automobile then left Ogden and drove around for some time, the prosecutrix being seated

in the back seat of the automobile with 3 of the boys. The prosecutrix admitted kissing one Johnny Dominguez (T.74) and other evidence indicates all of the boys kissed the prosecutrix (T.164). The party also drank a considerable quanity of beer, including the prosecutrix.

Frank Dominguez, the driver of the automobile parked in what in known as "West Ogden". The car was parked in a deserted area. There then arose an argument in the automobile concerning the prosecutrix and who would "go with Betty" (T.16). The driver of the automobile thereupon asked the prosecutrix to stay behind (T.18) saying that he would come back and pick her up a little later.

The defendants Herrera and Navarez also left the automobile which then drove off. The prosecutrix then contends each of the defendants forced her to have sexual intercourse with them. It is the contention of the defendants that while they admit an act of intercourse did occur, that it was with the consent of the prosecutrix.

STATEMENT OF POINTS TO BE ARGUED

POINT I

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER THE OBJECTION OF COUNSEL FOR THE DEFENDANTS, EVIDENCE ELICITED FROM A WITNESS FOR THE DEFENSE THAT HE HAD BEEN ARRESTED AND HAD BEEN IN TROUBLE WHILE A JUVENILE.

POINT II

THAT THE COURT ERRED IN ALLOWING THE PROSECUTION TO IMPEACH VARIOUS WITNESSES FOR THE PROSECUTION.

POINT III

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THESE DEFENDANTS.

POINT IV

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THESE DEFENDANTS.

ARGUMENT

POINT I

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE OVER THE OBJECTION OF COUNSEL FOR THE DEFENDANTS, EVIDENCE ELICITED FROM A WITNESS FOR THE DEFENSE THAT HE HAD BEEN ARRESTED AND HAD BEEN IN TROUBLE WHILE A JUVENILE.

The prosecution was allowed, over objection, to ask a witness for the defense, Orlando Borella, numerous questions on cross examination merely to show that he had been arrested, or had been investigated in connection with minor offenses while a juvenile. On page 171 of the transcript the following examination took place of said witness by the prosecution:

Q How old are you?

A Seventeen.

Q You have been in a lot of trouble haven't you?

MR. BINGHAM: Your honor, I object to this.

THE COURT: The objection is overrruled. You can go into his manner of living.

Q You have had a lot of trouble haven't you?

A Yes, a little bit, yes.

Q You have been arrested numerous times haven't you?

A Not very many times.

MR. BINGHAM: I object again for the same reason your honor.

THE COURT: The objection is overruled.

Q Have you been arrested numerous times for having sex relations with other girls.

A Once.

Q How about Donny West?

A That was her

Q How about this Karen Stuart?

A No.

MR. BINGHAM: Your honor, may the records show

that the district attorney and the assistant district attorney in the presence of the jury are thumbing through leaves of paper and reading therefrom.

A I won't say nothing else now when that comes up.

THE COURT: It may so show.

MR. BINGHAM: I object to that on the grounds that it is prejudicial.

THE COURT: The objection is overruled. It is pertinent to the trial.

Q How about fighting with a knife in front of the Woodman of the World hall?

A That was a false arrest too.

Q How about the theft of some pigeons?

A About seven years ageo, yes.

MR. BINGHAM: How old were you at that time?

THE COURT: Just a moment, don't interrupt.

Q How about shooting a fellow in the eye with a BB gun?

A Yes. Carlos is the one I shot.

Q How about breaking windows out of 2548 Grant Avenue?

A No.

Q How about this, you, together with Lee Sanchez breaking windows in the West Ogden show?

A Yes.

Q How about shoplifting some chickens in Wilson Lane?

A No, sir.

Q You were arrested for that weren't you?

A I was arrested, yes.

MR. BINGHAM: Just a moment. I object again your honor. You mean they can read any charge they wish?

THE COURT: They may ask a juvenile about his conduct.

The prosecution was allowed to ask this witness if he had not been in a "lot of trouble" and to ask the 17 year old witness if he had not been arrested in connection with some 7 specific acts, including on for stealing pigeons when the witness was 10 years of age. None of these alleged arrests purport to be in any way connected with the offense being tried in this trial.

The prosecution admits that it does not know the outcome of any of the charges it referred to while questioning the witness (T.177). In other words a

juvenile was allowed to be impeached on mere accusations and the fact that in some instance he had beenarrested. Surely, the fact that a person is accused of a crime, or even arrested for a crime is not tantamount to guilt or conviction? The prosecution by thumbing through papers while questioning this witness, in the presence of the jury, could not but convey the unfair and unjustified impression that here was a witness with a record "as long as your arm".

At 58 American Jurisprudence page 408, it is stated:

> "In many jurisdictions a former arrest of a witness on a criminal charge, if not followed by a conviction, may not be shown to impeach his veracity, unless the fact is relavant to show interest, as in the case of an accomplice, or to show motive to testify falsely. The fact of arrest may not be shown by independent evidence, or on cross examination of the witness himself, including the accused defendant testifying as a witness in his own behalf, at least as against a claim of privilege. The rejection of such evidence as to a defendant testifying as a witness, over objection and in violation of the rule, may constitute prejudicial error requiring a reversal. The principal reason for excluding the question on cross examination is that an accusation does not necessarily carry any implication of guilt."

See also Burgess v. State, 155 A. 153; Caples v. State, 104 P 493; Thornton v. State, 93 NW 1107;

Coulston v. United States, 51 F2d 178; People v. Bond, 118 NE 14; State v. Abley, 80 NW 225; People v. Crapo, 76 NY 571; People v. Brown, 72 NY 571; Koch v. State, 106 NW 531.

In Ross v. United States, (CCA7th) 93 F2d 950 it was held to be improper for a witness to be asked if he has been in trouble before.

In the case of State v. Nyhus, 124 NW 71 the court held that it was improper to ask a witness if he has ever been arrested.

Our own court in the Utah case of State v. Houghensen, (1936) 64 P2d 229 set out various rules to guide the discretion of the court in determining what impeaching evidence should be allowed and what should not.

> "(14) (8) Where the questions of the cross-examiner call for isolated or sporadic acts or conduct directly tending to degrade the witness, or show moral turpitude, whether they tend to subject the the witness to punishment for a felony or not, but which could be said to mark the witness as one of low or dissolute character and which do not present any reasonable basis for an assumption that the witness was not telling the truth in the case, objection on the ground of irrelevancy and incompetency should be sustained."

The allowing of the prosecution to impeach the credibility of the Witness Borella by mere accusation could not but have destroyed the value of his evidence in the eyes of the jury. The witness had testified the prosecutrix had kissed all of the boys in the group, had been out riding around with the witness earlier that day, and of other matters in direct contradiction to the testimony of the prosecutrix. Matters of vital importance to the defense in connection with a charge of rape.

POINT II

THAT THE COURT ERRED IN ALLOWING THE PROSECUTION TO IMPEACH VARIOUS WITNESSES FOR THE PROSECUTION

A witness for the prosecution Dr. Hirst, in his testimony indicated the prosecutrix was composed and showed no evidence of forced intercourse excepting torn dress and small abrasion on her neck (T.56) He indicated he did not recall any abrasions on her legs (T. 57). Whereupon the Court allowed the witness to be cross examined by the prosecution concerning a statement or report that the witness evidently had submitted. This statement was not introduced into evidence. The witness still did not recall making such a statement that there were abrasions on the

legs of the prosecutrix. The jury was given the impression that the witness had forgotten the abrasions, which was not supported by any competent evidence whatsoever.

Again on page 246 of the transcript the State was permitted to ask its own witness on direct examination the following questions:

Q Have you been in the industrial school?

Q You have been in a lot of trouble have You?

It would appear that the State's main interest in calling the above witness, Johnny Dominguez, was to show that he had been in trouble with the law, and to then show the jury that this is the type of fellow these defendants associated with. He was led by the State on the grounds he was hostile (T. 240). To condone the above form of proving the commission of a crime by the reputation of your associates would appear to be highly improper and prejudicial to the casue of these defendants.

POINT III

THAT THE ERRORS OF THE COURT WERE CUMULATIVE AND WHEN VIEWED IN CONNECTION WITH EACH OTHER RESULTED IN PREJUDICE TO THESE DEFENDANTS

It is a fundamental rule that even though the errors of the court, if they were considered as separate and isolated instances may not amount to the deprivation of a fair trial, if the various errors combine to reach that result, prejudice to the defendants may be shown.

It is submitted that the errors of the court as set forth heretofore do constitute prejudice to the defendants and deprived them of a fair trial.

POINT IV

THAT THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THESE DEFENDANTS.

Both of the defendants admit that they had sexual intercourse with the prosecutrix but deny that any force was used. The report of the examining doctor does not indicate that there was violence of the type usually present in a rape case (t.56).

The evidence further discloses the prosecutrix to be a woman who while married had been going steady with one man (t.29) and had planned to marry another(t. 63). She further indicated that she was not mad at the defendants (t. 41).

Nor is it disputed that the prosecutrix flirted with the defendant Navarez and invited him into the automobile (t.48). The testimony of the prosecutrix is so inherently improbable, and when read as a whole is so indicative of a person whose testimony should be given little credence, that to sustain the conviction of these defendants upon such evidence would be unfair and unjust.

A charge of rape, as is often said, is easily made and hard to disprove.

CONCLUSION

That the conviction of these defendants should be reversed in that they were deprived of a fair, orderly and proper trial. That improper evidence was received and that said evidence prejudiced the defendants in the eyes of the jury.

Respectfully submitted
L. G. Bingham
Attorney for the defendants and Appellants